NO. PD-0575-19

IN THE
COURT OF CRIMINAL APPEALS OF TEXAS
SITTING AT AUSTIN, TEXAS

ANTHONY CARTER,
Appellant

v.

STATE OF TEXAS,
Appellee

STATE'S BRIEF ON THE MERITS

K. SUNSHINE STANEK
Criminal District Attorney
Lubbock County, Texas

AMANDA MCKINNEY SAY
EDWARD WHARFF
VIRGINIA SIMPSON
Assistant Criminal District Attorneys
(Trial Attorneys)

BY: LAUREN MURPHREE
Assistant Criminal District Attorney
Lubbock County, Texas
State Bar No. 24085059
P. O. Box 10536
Lubbock, Texas 79408
Phone: (806) 775-1133
Fax: (806)775-7930
E-mail: LMurphree@lubbockcda.com
(On Appeal)
ATTORNEY FOR THE STATE

IDENTITY OF PARTIES AND COUNSEL

Appellant:

Anthony Carter

Appellant's trial attorneys:

Charles Chambers, Attorney at Law, 915 Texas Avenue, Lubbock, Texas 79401; phone (806) 763-9900; e-mail: charleschambers_540@msn.com

Michael LeMond, Attorney at Law, 1411 19th Street, Suite 101, Lubbock, Texas 79401; phone (806)370-3750; e-mail: notices@thefighterattorney.com

Appellant's appellate counsel:

Allison Clayton, The Law Office of B. Allison Clayton, P.O. Box 64752, Lubbock, Texas 79464-4752; phone (806)773-6889; e-mail: allison@allisonclaytonlaw.com

State of Texas:

At trial:

Amanda Say, Edward Wharff, Virginia Simpson, Assistant Criminal District Attorneys, Lubbock County Criminal District Attorney's Office, P.O. Box 10536, Lubbock, Texas 79408; phone (806)775-1100; fax (806)775-7930

On appeal:

Lauren Murphree, Assistant Criminal District Attorney, Lubbock County Criminal District Attorney's Office, P.O. Box 10536, Lubbock, Texas 79408; phone (806)775-1133; e-mail: lmurphree@lubbockcda.com

Trial Judge:

Honorable John "Trey" McClendon, III, Presiding Judge, 137th District Court of Lubbock County, Texas, 904 Broadway, Suite 300, Lubbock, TX 79401

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STATE'S BRIEF ON THE MERITS

TO THE HONORABLE COURT OF CRIMINAL APPEALS:

The State of Texas, by and through the Lubbock County Criminal District Attorney, respectfully presents to this Court its brief on the merits in this cause.

ISSUE PRESENTED

Whether this Court should craft a separate standard of review for technical subject matter when there is no precedent or compelling justification for departing from the standard articulated in *Jackson v. Virginia*, and applied by the court of appeals below.

GROUND ON WHICH THE COURT HAS GRANTED REVIEW

In a sufficiency analysis, may the court of appeals infer evidence establishes elements of the offense defined by technical terms if no such evidence was presented at trial?

STATEMENT REGARDING ORAL ARGUMENT

The Court has determined that oral argument will not be permitted.

STATEMENT OF FACTS

In 2014, the Lubbock County Criminal District Attorney and the Lubbock City Attorney sent a joint letter to Appellant and fifty-two other local business owners warning against the continued sale of synthetic marijuana. (State's Ex. 1; RR vol. 4, p. 34). The letter was hand delivered to various smoke shops around town with the purpose of putting the shop owners on notice that they were believed to be selling controlled substances, and that the sales would no longer be tolerated in Lubbock County. (RR vol. 4, p. 34). One such letter was hand-delivered to Tobacco Road on Avenue Q, in Lubbock County, Texas. (RR vol. 4, p. 34). Appellant was identified as the owner of the Avenue Q store, as well as two other locations on Avenue A and Parkway Drive. (RR vol. 4, p. 35).

From 2014 to 2017, investigators from the District Attorney's Office and officers from the Lubbock Police Department continued to monitor Appellant and his businesses. Several search warrants were served on Appellant's business and eventually his home, each one turning up significant inventories of synthetic cannabinoids and other evidence consistent with narcotics trafficking. (RR vol. 4, pp. 40-41, 90). During the execution of each warrant, Appellant was told the products he was selling were illegal. (RR vol. 4, p. 41; RR vol. 5, p. 76)

In response to a warrant executed in 2017, Appellant claimed he had toxicology reports that had tested various substances for illegal compounds. (RR vol. 5, pp. 75-76; State's Ex. 53 C, D, and E). State's Exhibit 53-E is a copy of a lab report that allegedly tested Chilly Willy for approximately 100 different substances. (State's Ex. 53-E). One of those substances was XLR-11, a synthetic compound that was popular in 2013, but was rarely seen in 2017 after it was been banned by the legislature. Multiple witnesses at trial testified that as soon as synthetic substances were detected and banned, drug makers would create new substances to use. (RR vol. 5, p. 114). None of the Chilly Willy products were tested for fluoro-ADB, the substance alleged in the indictment. (RR vol. 7, p. 53). On May 3, 2017, LPD executed a final search warrant at Appellant's home. There, multiple large boxes containing individually packaged bags of synthetic marijuana were located along with many other items indicative of narcotics trafficking and a counter-surveillance operation. (RR vol. 5, p. 155, 160-61; RR vol. 6, pp. 56-57).

Following the final raid on his home, Appellant was charged by indictment with knowingly possessing, with the intent to deliver, "'Chilly Willy; 2g Chronic Hypnotic' which contains a compound controlled in Penalty Group 2-A, Chapter 481.1031(b)(5) of the Texas Health and Safety Code, to wit: fluoro-ADB, by aggregate weight including adulterants and dilutants 400 grams or more." (CR p. 6). At trial, the State's forensic analyst from the Department of Public Safety, John Keinath, testified about the current structure of Penalty Group 2-A, and how it classifies synthetic substances. Keinath began with a broad overview of Penalty Group 2-A generally, telling the jury that

Penalty Group 2-A is covered by Health and Safety Code chapter 481, section 1031. (RR vol. 7, p. 12). While some synthetic substances are still listed by name, Keinath explained that most synthetic substances are now classified by their structure. (RR vol. 7, p. 15) ("So there are a whole bunch of different combinations of structures, and depending on what kinds of groups create that molecule, it's classified by different subsections in the law.").

Keinath then focused his testimony on fluoro-ADB, the substance alleged in the indictment:

> Q. And specifically, you are here today to talk about one specific synthetic compound, correct?
> A. Correct.
> Q. And what compound is that?
> A. The way we report it, it's fluoro-ADB.
> Q. And that is—is it listed under Penalty Group 2-A?
> A. Based off of the structural class, yes.
> Q. And you listed off the long chapter number 481.1031, and specifically this one is in subpart (b)(5), correct?
> A. That's correct.

(RR vol. 7, pp. 15-16). The testimony from Keinath that fluoro-ADB fell within section 481.1031(b)(5), went uncontroverted by Appellant at trial.

Keinath further explained that the relevant statute classifies three different parts of a molecule: the core component, the group A component, and the link component. (RR vol. 7, pp. 17-18). Depending on how you grouped the components, "you can . . . make quite a few different structures. But by doing so, it changes what the structure is called or what it is named." (RR vol. 7, p. 18). While looking at a demonstrative exhibit

that depicted fluoro-ADB, the jury then heard how the law requires one core component, one group A component, and one link component as listed in the statute be situated in certain positions—otherwise it would change the structure, and what it is called or named. (RR vol. 7, 16-18).

The jury then learned how the core component indazole fits within the chemical structure of fluoro-ADB. (RR vol. 7, p. 19) (*See* TEX. HEALTH & SAFETY CODE § 481.1031(a)(1)). Next, the jury heard that the group A component contained in flouro-ADB is methoxy dimethyl oxobutane. (RR vol. 7, pp.19-20) (*See* § 481.1031(a)(2)). Last, Keinath told the jury that the link component contained in fluoro-ADB was carboxamide, and that "based off of those three combinations, that's why it is able to be controlled under the structural class with how the law is currently written." (RR vol. 7, p. 20) (*See* § 481.1031(a)(3)). The jury found Appellant guilty as indicted, and sentenced him to ninety years imprisonment and a $100,000 fine. (CR p. 44).

SUMMARY OF THE ARGUMENT

Appellant seeks to create two different standards of review: one to apply to offenses with non-technical elements, and another, more stringent standard, to apply to offenses with technical elements. Or perhaps also to cases involving technical subject matter? The extent argument is unclear and leads quickly to the unsustainability of such a bifurcated, offense-dependent, standard of review system that lacks any precedent.

Such a standard is unnecessary, however, because the court of appeals correctly decided that sufficient evidence existed for a rational juror to conclude, beyond a reasonable doubt, that fluoro-ADB is a controlled substance within the scope of 481.1031(b)(5). Jurors have long been permitted to draw inferences from basic facts to ultimate facts. Taking the indictment, the sum of the forensic analyst's testimony, and the Court's Charge together, the jury was left to draw only the most basic of inferences that the components of fluoro-ADB were in the statutorily required positions. With wholly uncontroverted testimony that fluoro-ADB was controlled by Penalty Group 2-A, and that it was controlled because of its structural class, the court of appeals did not stretch the evidence and reasonable inferences beyond a rational jury's understanding to reach the correct result.

ARGUMENT AND AUTHORITIES

I. THE STANDARD OF REVIEW IN A SUFFICIENCY ANALYSIS REMAINS THE SAME REGARDLESS OF THE TECHNICAL NATURE OF THE ELEMENTS.

In assessing the sufficiency of the evidence, the standard of review is whether any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. The evidence is viewed in the light most favorable to the verdict. *Murray v. State*, 457 S.W.3d 446, 448 (Tex. Crim. App. 2015) (*quoting Jackson v. Virginia*, 443 U.S. 307, 319 (1979) (emphasis in original)). This standard does not intrude on the factfinder's solemn duty to resolve conflicts in the testimony, weigh the evidence, and draw reasonable inferences from basic facts to ultimate facts. *Johnson v. State*, 560 S.W.3d 224, 226 (Tex. Crim. App. 2018) (quoting *Musacchio v. United States*, -- U.S. --, 136 S.Ct. 709, 715, 193 L.Ed.2d 639 (2016)). The reviewing court's role on appeal is simply to guard against the rare occurrence when a jury does not act rationally. *Laster v. State*, 275 S.W.3d 512, 517 (Tex. Crim. App. 2009). If the record supports conflicting inferences, a reviewing court should presume that the factfinder resolved the conflicts in favor of the verdict and defer to that determination. *Murray*, 457 S.W.3d at at 448–49. A reviewing court should also "determine whether the necessary inferences are reasonable based upon the combined and cumulative force of all the evidence when viewed in the light most favorable to the verdict." *Clayton v. State*, 235 S.W.3d 772, 778 (Tex. Crim. App. 2007).

In a sufficiency review, the essential elements of an offense are those set out in a hypothetically correct jury charge. *Hooper v. State*, 214 S.W.3d 9, 14 (Tex Crim. App. 2007) (citing *Malik v. State*, 953 S.W.2d 234 (Tex. Crim. App. 1997)). Here, Appellant was charged under Texas Health and Safety Code section 481.113(a) with possession of a controlled substance under penalty group 2-A. Under that statute, the essential elements of the offense are that 1) Appellant; 2) knowingly; 3) possessed; 4) with intent to deliver; 5) a controlled substance listed in Penalty Group 2-A, to wit, fluoro-ADB; 6) in an amount 400 grams or more. TEX. HEALTH & SAFETY CODE § 481.113(a). On appeal to this Court, Appellant challenges only the proof supporting the fifth element—that fluoro-ADB (as alleged in the indictment)—is a controlled substance listed in Penalty Group 2-A. At trial, the state's forensic analyst testified that fluoro-ADB was listed under Penalty Group 2-A based on its structural class. (RR vol. 7, pp. 15-16). The analyst further cited the jury to Penalty Group 2-A, found in Texas Health & Safety Code section 481.1031(b)(5), which was explained in detail to the jury.

A reviewing court should not use a "divide and conquer" strategy for evaluating the sufficiency of the evidence by "explaining away individual facts that, when considered together, would support a reasonable inference that [the defendant] committed the charged offense." *Murray*, 457 S.W.3d at 448–49. As long as there is some evidence upon which a rational factfinder could conclude, beyond a reasonable doubt, that the defendant committed the offense, the jury's verdict should be upheld. *Id.* This Court recently reiterated that as long as each inference drawn by the jury is

supported by the evidence, juries can draw any reasonable inference from the facts. *Curry v. State*, -- S.W.3d --, 2019 WL 5617883 at *6 (Tex. Crim. App. Oct. 30, 2019) (designated for publication).

Appellant asks this court to employ a divide and conquer approach to the testimony at trial, explaining away each statement in isolation as "too difficult" for not only the jury, but lawyers and courts to understand. Yet, Appellant also acknowledges that when subject matter is difficult or technical, parties regularly employ the testimony of subject-matter experts to assist the trier of fact in understanding the subject at issue. The State did just that.

At trial, the State's expert forensic analyst explained the current state of the law to the jury, how it's current structure is out of necessity, and then explained how the law worked. (RR vol. 7, pp. 12-15). He then applied that general knowledge to the specific substance at issue—fluoro-ADB—and told the jury that fluoro-ADB was controlled under Penalty Group 2-A, found in Texas Health and Safety Code § 481.1031(b)(5). (RR vol. 7, pp. 12-20). The rational inference, then, was that the components of fluoro-ADB were in the statutorily required positions. This was hardly a huge analytical leap for the jury to take based on the expert's testimony at trial. Importantly, there was no suggestion by either party that the components of fluoro-ADB were *not* in the required positions.

II. THE COURT OF APPEALS DID NOT EXPAND THE BASIC ASSUMPTIONS PERMITTED BY *JACKSON V. VIRGINIA*.

Securing a conviction under Texas Health and Safety Code § 481.113(a) requires the State to prove "not only that the substance in question was within § 481.1031(b)(5) but also that the accused knew it was a substance within that provision." *Carter v. State*, 575 S.W.3d 892, 897 (Tex. App.—Amarillo 2019) (internal citations omitted). In his petition for discretionary review, Appellant challenges only that the State proved that the substance in question was prohibited under § 481.1031(b)(5). Noting that criminal statutes must be strictly construed, the court below held that the State must also prove that the respective components of the substance were attached the in the statutorily required manner. *Id.* at 898.

Although the State's forensic chemist did not *expressly* state that the compounds contained within fluoro-ADB were in the numeric positions required by the statute, there was also nothing to suggest that the components were not in the statutorily required positions. *Carter*, at 898-99. Instead, the combined and cumulative force of the evidence supports only the inference that the components were in the required positions. The court of appeals' opinion below reveals a laundry list of statements made by the chemist that would "permit the jury to rationally conclude, beyond a reasonable doubt, that fluoro-ADB was a controlled substance within the scope of § 481.1031(b)(5)." *Carter*, at 899. The court of appeals' holding reveals that it was the

evidence at trial, not the reviewing court, that imparted technical knowledge upon the jury to permit their verdict.

A. The State's expert explained to the jury the building block approach taken by the legislature to effectively regulate dangerous synthetic substances, and how fluoro-ADB fits within the statutory scheme.

Appellant repeatedly argues the technical elements of the statute are simply too difficult for any juror to understand, as if the State simply said the words "fluoro-ADB" and left the jury to piece together a complex chemical compound on its own. To the contrary, the State's expert testimony spanned the course of two days and included an in-depth discussion of the applicable statute, the structure of synthetic compounds, fluoro-ADB specifically, and more.

Keinath explained to the jury that prior to 2015, Penalty Group 2-A classified synthetic substances by name. *See* § 481.1031 (2013). As a result of the nature of producing synthetic substances, drug makers were able to change the compounds by one or two molecules and create equally potent synthetic substances that were not covered by the statute. (RR vol. 7, pp. 14-15). In response, the legislature changed section 481.1031 to classify synthetic compounds by structure, instead of by name. *See* § 481.1031 (2017). Finally, the law could stay ahead of the drug makers instead of vice versa. (RR vol. 7, pp. 14-15).

Keinath told the jury that section 481.1031, as it currently reads, lists some compounds by name like the traditional penalty groups name cocaine or

methamphetamine, for example, but it also classifies synthetic compounds by chemical structure. (RR vol. 7, pp. 14-15). In so doing, the legislature took a building block approach to § 481.1031 that proscribes certain chemical structures of synthetic cannabinoids. The first building block is a list of core components. (RR vol. 7, p. 18); *see* § 481.1031(a)(1). If the compound in question does not contain one of the listed core components, then said compound is not prohibited under §481.1031. (RR vol. 7, p. 18). The next building block requires that at the 3-position on the core component, one of the link components listed in §481.1031(a)(3) be attached. (RR vol. 7, p. 18); *see* § 481.1031(a)(3), (b)(5). Next, one of the group A components listed in §481.1031(a)(2) must be attached to the link component. *See* § 481.1031(a)(2), (b)(5). The final building block requires that the core component have anything else substituted at the 1-position. *Id.* at (b)(5). If a person possesses a substance made up of the listed core component, with a listed link, and a listed group A component, and if those components are assembled in the manner listed in §481.1031(b)(5), then that person possesses a prohibited substance under Texas law. (RR vol. 7, p. 18).

Additionally, the name of a chemical imparts its properties by written or spoken words.[1] The name of a compound contains "within itself an explicit or implied relationship to the structure of the compound, in order that the reader or listener can

[1] IUPAC, Nomenclature of Organic Chemistry, Preamble, https://www.acdlabs.com/iupac/nomenclature/93/r93_35.htm

deduce the structure (and thus the identity) from the name."[2] As a result, each named compound identifies only one structure. Keinath explained this concept to the jury in simple terms when he testified: "Now, with any synthetic compound, you can take any of those core components, group A components, and link components, and make quite a few different structures. But by doing so, it changes what the structure is called or what it is named." (RR vol. 7, p. 18). Stated another way, based on its structure, "fluoro-ADB" *necessarily* means the core component of indazole has been substituted at the 1-position to any extent (by a fluorocarbon chain), and substituted at the 3-position with the link component carboxamide. (RR vol 7, p. 18). It also imparts on the listener that the Group A component methoxy dimethyl oxobutane is attached to the link component carboxamide. (RR vol 7, p. 18).

It naturally follows then, that evidence that the substance tested positive for fluoro-ADB, a substance controlled by Penalty Group 2-A, implicitly proved that the requisite positioning was in place. *See* § 481.113(a).

[2] *Id.*

B. The evidence at trial, not the reviewing court, imparted sufficient technical knowledge upon the jury to conclude that fluoro-ADB is controlled under Penalty Group 2-A.

Appellant was charged by indictment with knowingly possessing, with the intent to deliver, "'Chilly Willy; 2g Chronic Hypnotic' which contains a compound controlled in Penalty Group 2-A, Chapter 481.1031(b)(5) of the Texas Health and Safety Code, to wit: fluoro-ADB" (CR p. 6).

After testifying about the law generally, Keinath focused his testimony on the substance alleged in the indictment—fluoro-ADB.

> Q. And specifically, you are here today to talk about one specific synthetic compound, correct?
> A. Correct.
> Q. And what compound is that?
> A. The way we report it, it's fluoro-ADB.
> Q. And that is—is it listed under Penalty Group 2-A?
> A. Based off of the structural class, yes.
> Q. And you listed off the long chapter number 481.1031, and specifically this one is in subpart (b)(5), correct?
> A. That's correct.

(RR vol. 7, pp. 15-16). This testimony from Keinath, that fluoro-ADB fell within 481.1031(b)(5), went uncontroverted by Appellant at trial.

Keinath further explained that the relevant statute classifies three different parts of a molecule: the core component, group A component, and the link component. (RR vol. 7, pp. 17-18). Depending on how you grouped the components, "you can . . . make quite a few different structures. But by doing so, it changes what the structure is called

or what it is named." (RR vol. 7, p. 18). While looking at a demonstrative exhibit that depicted fluoro-ADB, the jury then heard how the law requires one core component, one group A component, and one link component as listed in the statute be situated in certain positions—otherwise it would change the structure, and what it is called or named. (RR vol. 7, 16-18). The jury then learned how the core component indazole fits within the chemical structure of fluoro-ADB. (RR vol. 7, p. 19); *see* § 481.1031(a)(1). Next, the jury heard that the group A component contained in flouro-ADB is methoxy dimethyl oxobutane. (RR vol. 7); *see* § 481.1031(a)(2). Last, Keinath told the jury that the link component contained in fluoro-ADB was carboxamide, and that "based off of those three combinations, that's why it is able to be controlled under the structural class with how the law is currently written." (RR vol. 7, p. 20); *see* § 481.1031(a)(3).

On cross-examination, trial counsel for Appellant remarked "Q: y'all spent a lot of time, [the State] and you, on how the chemical compounds work with the placement of the . . . molecules. [W]here the molecules are. *And that's what makes a compound, the place where the molecules are stuck, correct*." A: Correct." (RR vol. 7, p. 87) (emphasis added). From the tenor of trial counsel's question, it is apparent that Keinath, via questioning by the State, had just explained that each of the components of fluoro-ADB had to be in a particular location to make a specific compound. Defense counsel again discussed with Keinath how the location of the fluorine can change the makeup of a structure to be considered an isomer. (RR vol. 7, p. 96). Defense counsel's questioning illustrates that there was extensive testimony from the State's forensic analyst about the

importance of the positions of the structural components, and how integral those positions were to making specific substances even if the magic words "one-position" and "three-position" were not used.

The Court's Charge further instructed the jury that Appellant was accused of committing an offense under § 481.113, and that "'Controlled Substance' means a substance, including a drug, an adulterant, and a dilutant, listed in Schedules I through V or Penalty Group 1, 1-A, 2, 2-A, 3, or 4." (CR p. 58). Neither the indictment nor the Court's Charge contained the position of the molecules as elements of the offense. (CR pp. 6, 52).The State was required to prove the substance was fluoro-ADB, a controlled substance under Penalty Group 2-A. The testimony the jury heard at trial was that the substance seized from Appellant was fluoro-ADB, a controlled substance under Penalty Group 2-A. The testimony at trial was sufficient to sustain the conviction.

In addition to the foregoing, the court of appeals highlighted nine specific instances where Keinath referenced the structure of the compounds as they related to the law:

> 1) "[O]ne of the recent additions to the law is instead of listing each substance by name, we now actually classify a synthetic compound ***by the structure***"; 2) "[T]here are a whole bunch of different ***combinations of structures***, and depending on what kinds of groups ***create that molecule***, it's classified by different subsections in the law"; 3) Fluoro-ADB fell within structural class § 481.1031(b)(5); 4) "From a chemist's perspective, really, and as a forensic chemist, we're looking at ***how the structure relates*** to the law"; 5) "[S]o we are looking at different parts of the compound to see if it falls within that particular subsection" of the statute; 6) "[S]ince we are ***looking at the structural class***, now we are actually looking at the structure itself and seeing if that falls ***within a***

> ***particular combination*** of groups"; 7) "I do know ***structurally*** [fluoro-ADB] is under the 2-A"; 8) The law "classifies three different parts ***of the molecule***"; 8) from "a forensic aspect, I can at least tell you that [fluoro-ADB is] the indazole ring group, and then also I have tried to make it easier on all of us by showing how the indazole actually ***fits in with the structure***"; and 9) "[B]ased off of those three combinations [of indazole, methoxy dimethyl oxobutane, and carboxamide], that's why it is able to be controlled under the structural class with how ***the law is currently written***." (Emphasis added). To that we add his answer of "Correct" when asked, "And that's what makes a compound, the place where ***the molecules are stuck***, correct?" and his statement that "but it's where the fluorine is actually attached to a particular carbon" when asked whether a different form of fluoro-ADB would be a controlled substance under § 481.1031(b)(5).

Carter, at 898-99 (emphasis in original). The rational inference is that indazole, carboxamide, and methoxy dimethyl oxobutane are located in the statutorily required positions to make up the substance alleged in the indictment as fluoro-ADB.

An appellant recently made a similar attack on the proof of a controlled substance in a synthetic cannabinoid trial in *Bridges v. State*. No. 04-17-00683-CR, 2018 WL 5268855 (Tex. App.—San Antonio, Oct. 24, 2018, no pet.) (not designated for publication). There, the appellant argued that the State failed to prove the charged substances were illegal. *Id.* at *3. In upholding the conviction, the court of appeals noted that the forensic analyst testified at trial that the substances tested positive for "5-fluoro ADB, MMB-FUBINACA," the chemical that was alleged in the indictment. *Id.* The analyst explained to the jury the chemical combinations that were required under the statute, and that the substance in the case contained the statutorily required components. *Id.* The court of appeals held "the evidence at trial showed that the same

chemical compound found in the substances seized from *Bridges* was also included in the indictment and the charge. We therefore conclude the evidence was sufficient to prove beyond a reasonable doubt that Bridges possessed a controlled substance." *Id.* at *4. Just as in *Bridges*, the evidence at trial showed that the same chemical compound found in the substance seized from Appellant was the same as that alleged in the indictment and the charge.

Jurors have long been permitted to draw rational inferences from basic facts to ultimate facts. When Keinath testified that based on its structural class, fluoro-ADB was controlled under Penalty Group 2-A, having explained what all of those terms mean, the rational inference was that the parts of fluoro-ADB were arranged in the statutorily required positions. It was the evidence produced at trial, not the reviewing court, that gave the jury sufficient evidence to rationally conclude, beyond a reasonable doubt, that fluoro-ADB is a controlled substance within the scope of § 481.1031(b)(5).

CONCLUSION AND PRAYER

The State respectfully requests that the Court affirm the opinion of the Seventh Court of Appeals affirming the trial court's judgment.

WHEREFORE, the State respectfully requests that this case be set for submission on briefs, and that after submission, this Court affirm the judgment of the Seventh Court of Appeals.

Respectfully submitted,

K. SUNSHINE STANEK
Criminal District Attorney
State Bar No. 24027884

By: /s/ Lauren Murphree
Lauren Murphree
Assistant Criminal District Attorney
Lubbock County, Texas
State Bar No. 24085059
P.O. Box 10536
Lubbock, Texas 79408
(806)775-1133
FAX (806)775-7930
E-mail: LMurphree@lubbockcda.com
Attorney for the State

CERTIFICATE OF SERVICE

I certify that a true copy of the foregoing brief has been delivered to Allison Clayton, Attorney for Appellant, through the electronic filing manager to her e-mail address on November 13, 2019. I additionally certify that on this day service was made through the electronic filing manager to Stacey Soule, the State Prosecuting Attorney, at information@spa.texas.gov.

K. SUNSHINE STANEK
Criminal District Attorney
State Bar No. 24027884

By: /s/ Lauren Murphree
Lauren Murphree

CERTIFICATE OF COMPLIANCE

Pursuant to TEX. R. APP. P. 9.4(i)(3), I further certify that, relying on the word count of the computer program used to prepare the foregoing State's Response, this document contains 4,374 words, inclusive of all portions required by TEX. R. APP. P. 9.4(i)(1) to be included in calculation of length of the document.

K. SUNSHINE STANEK
Criminal District Attorney
State Bar No. 24027884

By: /s/ Lauren Murphree
Lauren Murphree